LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 27 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 943

LEROY COOKS, ET AL.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 and THE TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Respondents.

BRIEF OF THE TEXAS AND NEW ORLEANS RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH M. PATTERSON
1600 Esperson Building
Houston, Texas 77002
Attorney for Respondents

Of Counsel:

BAKER, BOTTS, SHEPHERD & COATES

PRINTED IN U.S.A. — BY DELARUE/TEXAS

INDEX

	Page
Question Presented	1
Statement of the Case	1
Reasons Why the Petition Should Not Be Granted	3
1. The Supreme Court will not review the fact finding below	3
2. The fact findings and conclusions of the District Court, affirmed by the Court of Appeals, are amply supported by the record and are correct	6
3. The jury selection cases cited in the Petition are inapposite	9
Conclusion	12
Certificate of Service	12

TABLE OF AUTHORITIES

Cases

Avery v. Georgia, 345 U.S. 559	10
Boling v. Sharp, 349 U.S. 497	9
Brownfield v. South Carolina, 189 U.S. 426	9
Cassell v. Texas, 339 U.S. 282	9
Central of Georgia Railway Co. v. Jones, 229 F. 2d 648 (5th Circuit)	5
Comstock v. Group of Institutional Investors, 335 U.S. 211, 214	3
Corn Products Ref. Co. v. CIR, 350 U.S. 46, 51	3
General Pictures Co. v. Electric Co., 304 U.S. 175, 178	3
Hill v. Texas, 316 U.S. 400	10
Labor Board v. Pittsburgh SS Co., 340 U.S. 498	4
Labor Board v. Walton Mfg. Co., 369 U.S. 404	4
Labor Board v. Waterman SS Co., 309 U.S. 206	3, 4
Martin v. Texas, 200 U.S. 316	9
Maynard v. Durham & S. R. Co., 365 U.S. 160	4
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325	4
Norris v. Alabama, 294 U.S. 587	9

	PAGE
Richardson v. T&NO RR Co., 242 F. 2d 648 (5th Circuit)	5
Rogers v. Missouri Pacific RR Co., 352 U.S. 500	4
Smith v. Mississippi, 162 U.S. 592	9
Smith v. Texas, 311 U.S. 128	9, 10
Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192	5
Swain v. Alabama, No. 64, October Term, 1964, 25 U.S. Supreme Court Bulletin No. 14, p. 997, March 8, 1965	4, 10
Tarrance v. Florida, 188 U.S. 519	9
Teamsters Local v. Labor Board, 365 U.S. 667	4
Thomas v. Texas, 212 U.S. 278	10
Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210	5
United States v. Dickinson, 331 U.S. 745, 751	3
United States v. Johnston, 268 U.S. 220, 227	3
Universal Camera Corp. v. Labor Board, 340 U.S. 474	4

Constitution

Fifth Amendment	2, 9
Fourteenth Amendment	5, 9

Statutes

Railway Labor Act, 45 U.S.C. Sections 151, et seq.	2
28 U.S.C. Section 1331	2

Miscellaneous

Robertson v. Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland Ed., 1951) Article 333	3

In The

Supreme Court of the United States

October Term, 1964

No. 943

Leroy Cooks, et al.,

Petitioners,

v.

Brotherhood of Railway Carmen of America, Local No. 991 and Local No. 783 and The Texas and New Orleans Railroad Company,

Respondents.

BRIEF OF THE TEXAS AND NEW ORLEANS RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

1. Will the Supreme Court redetermine facts found by the District Court pursuant to trial, and concurred in by the Court of Appeals?

STATEMENT OF THE CASE

This is a racial discrimination case under the Railway Labor Act.

The suit was filed October 2, 1958, by 29 Negro employees and former employees of The Texas and New Orleans Railroad Company in its facilities at Houston, Texas. The

trial complaint invoked federal jurisdiction under 28 U.S.C., Section 1331, the Fifth Amendment, and the Railway Labor Act. 45 U.S.C., Sections 151 et seq. (Tr. 289-290). Plaintiffs sued both their representative Union and employer Railroad Company praying for injunctive relief, establishment of seniority rights, for compensatory damages and for punitive damages against the Union (Tr. 304-306). Plaintiffs charged the defendant Union with failing to represent them without discrimination on account of their Negro race, and complain of the defendant Railroad Company for its alleged refusal to recognize some contract seniority rights to which plaintiffs claim they were entitled (Tr. 295, 299). The gravamen of the trial complaint was that defendants concealed from plaintiffs the existence of certain promotional rights to which they were entitled under the collective bargaining contracts between the Union and the Railroad, commencing with that of March 1, 1943, resulting in the deprivation of such rights, all because of plaintiffs' Negro race (Tr. 295-296, 298).[1] The complaint admits knowledge in plaintiffs of the contract rights, and cessation of any alleged discriminatory practices in 1955-1957 (Tr. 299-300).

The case remained dormant on the docket until November, 1962, when trial to the court was had, at which all parties produced evidence and were heard. The District Court entered judgment for defendants on November 1,

---

[1] But for passing statement, (Appellants' Brief, page 3; Petition for Certiorari, page 6), concealment went out of the case on appeal, doubtless because the District Court's finding that defendants "made reasonable efforts to inform plaintiffs of their rights", (Tr. 412), was supported by candid admission of two witnesses for plaintiffs, (Tr. 184-185, 208-212) as well as the uncontradicted testimony of two witnesses for defendants (Tr. 238-262, 282-285).

1963, (Tr. 417), upon findings of fact and conclusions of law filed November 27, 1963 (Tr. 404).[2]

The Court of Appeals affirmed, holding that "the evidence was fully developed and the trial court made findings of fact and reached conclusions of law contrary to the contentions of plaintiffs", and concluding "that the evidence supports the facts found, and the legal conclusions reached are correct." (Petition for Certiorari, pages 17-18).

Petitioners nevertheless seek a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. The Supreme Court Will Not Review The Fact Findings Below.

While the granting of certiorari is, of course, discretionary, the Supreme Court ordinarily refuses to review evidence or discuss specific findings of fact. *United States* v. *Johnston*, 268 U.S. 220, 227; *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178; *NLRB* v. *Waterman SS Co.*, 309 U.S. 206, 208. A corollary is the "two court" doctrine, which militates strongly against reviewing evidence when findings of fact have been concurred in by the two courts below. *Corn Products Ref. Co.* v. *CIR*, 350 U.S. 46, 51; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214; *United States* v. *Dickinson*, 331 U.S. 745, 751; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland Ed., 1951), Article 333. It may be said that the Supreme Court reviews fact findings only in situations where the lower court has taken the case

[2] Trial was pursuant to an agreed stipulation and order of severance, reserving defensive issues of laches and limitations, etc., but full opportunity to be heard on all plaintiffs' issues was had. Propriety of the severed trial is conceded. (Tr. 3; see Brief of Appellants in Court of Appeals, page 3).

away from the jury for judicial determination. Cf. *Maynard* v. *Durham & S. R. Co.*, 365 U.S. 160; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325; *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500. Under these authorities, the facts as found by the District Court and affirmed by the Court of Appeals, after its review of the evidence, must stand.

Discrimination is a matter of intent or purpose. *Teamsters Local* v. *Labor Board*, 365 U.S. 667; *Swain* v. *Alabama*, No. 64, October Term, 1964, 25 U.S. Supreme Court Bulletin No. 14, p. 997, March 8, 1965. Accordingly, the existence of unlawful discrimination such as that charged to the Railroad-employer here essentially requires proof that it denied plaintiffs certain contract rights, and in so doing it was motivated by an unlawful intent to discriminate on account of race. Discrimination is, therefore, fundamentally a question of fact,[3] and the determination of such fact issue by the Courts below is conclusive here.

It is to be recalled that this is an action by Railway employees for alleged deprivation of promotional rights under a collective bargaining agreement, in violation of statutory obligations placed on the representative Union and the employer Railroad by the Railway Labor Act. *This is not a civil rights case!* The only duty not to discriminate on account of race that is pertinent here is the statutory duty declared by the Court to exist by virtue

---

[3] As in cases of anti-union discrimination under the Laoor Management Relations Act, 1947, the courts uniformly review decisions of the National Labor Relations Board under the substantial evidence standard for review of questions of fact. *Labor Board* v. *Walton Mfg. Co.*, 369 U.S. 404; *Labor Board* v. *Pittsburgh SS Co.*, 340 U.S. 498; *Labor Board* v. *Waterman SS Co.*, 309 U.S. 206; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

of the Railway Labor Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210.[4] This duty rests upon a union because of the exclusive representative right and duty as to employees vested in it by the Act. An employer-carrier also has some statutory duty not to racially discriminate, say the courts, but the employer's duty derives from the collective bargaining relationship with the union and not directly from the Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203-204; Cf. *Richardson* v. *T&NO RR Co.*, 242 F. 2d 648 (5th Circuit); *Central of Georgia Railway Co.* v. *Jones*, 229 F. 2d 648 (5th Circuit). The employer can therefore be guilty of racial discrimination in violation of the Railway Labor Act only by participating in collective bargaining with a representative union so as to discriminate, on account of race, against employees or potential employees in the particular bargaining unit. To be specific, this suit charges this Railroad-employer with discriminatory deprivation of contract promotional rights as to the complaining Negro employees. At least two fact issues are necessarily involved to establish such a case, *viz:* (a) were the complainants *in fact* denied promotions to which they were entitled under the collective bargaining contract, and (b) were such denials *in fact* motivated by the prohibited intent to discriminate against the complainants because of their Negro race? *Both* of these issues *of fact* have been determined against complainants by the two courts below, upon ample evidence adduced at a full trial.

---

[4] Despite reference to the Fifth Amendment in the Trial Complaint (Tr. 290), and to the Fifth and Fourteenth Amendments in the Petition for Certiorari, (pages 5, 10-14), no constitutional right is involved in this case.

2. The findings and conclusions of the District Court, affirmed by the Court of Appeals, are amply supported by the record and are correct.

The petition for certiorari devotes less than one printed page to a discussion of the proof of alleged discrimination (Petition, page 9). Plaintiffs Taylor, Nichols and Glass, and plaintiffs' witness Altman testified in establishing plaintiffs' case (Tr. 7-227). This testimony and the exhibits incident thereto, taken alone and viewed most favorably, could establish no more than this:

Glass, Nichols and Taylor were employed in the Houston terminal as helpers, from 1940 to 1955, when they were promoted to the carman or inspector classification (Tr. 7, 88, 143). During 1943-1955 no Negroes were so promoted at the terminal, though Negroes were so promoted at the shop, another department of the Railroad in Houston under the same management (Tr. 21, 92, 148). Employees at the shop were represented by the same local union (Tr. 36). Glass, Nichols and Taylor, aware of a contractual right to promotion insofar as seniority was concerned, questioned a foreman named Miller in 1943 or 1944 about the possibility of promotion, and were told by him that Negroes were not used as carmen-inspectors (Tr. 27-28, 93, 150). Each of these plaintiffs admitted that no other person with the Railroad ever expressed such an attitude (Tr. 81, 138, 183), and Altman confirmed this fact (Tr. 222). Plaintiffs knew that Negroes were promoted in similar categories during this time (Tr. 35-36). They mentioned the Miller remark to their union steward Fontenet, a Negro, who said he would do something about it (Tr. 28, 94, 150). Despite the contract provisions for grievance processing, no grievance for any plaintiff was ever processed (Tr. 175), if indeed any were ever filed with Fontenet (Tr. 136). None of the

plaintiffs did anything further until they joined in the petition filed in this suit in 1958 (Tr. 32, 95, 153). Though each knew Mr. Wolff, the Union general chairman, and saw him frequently, none of the plaintiffs ever took the subject up with him (Tr. 30, 126, 165), nor did they ever attempt to go above Miller with the Company (Tr. 32, 78, 138-139, 153, 187).

The agreement between the Company and the Union provided for promotion of carmen helpers to carmen-inspectors on a basis of ability and seniority (Tr. 346-350), and familiarity with inspection rules of The American Association of Railroads and Regulations of the Interstate Commerce Commission were required (Tr. 407).

But despite advice by their General Chairman (Tr. 256) and steward Fontenet (Tr. 167, 237) none of the plaintiffs attempted to establish their qualifications. None bid on an inspectors job opening, though urged by Fontenet to do so (Tr. 34, 136, 162).

Much of plaintiffs' proof dealt with the claim of concealment. Glass and Nichols did not recall, or deny seeing the 1943 contract, notices to bid or qualify for higher jobs, etc. (Tr. 13, 75, 90, 139), but Taylor admitted seeing the 1943 contract (Tr. 144), and disclaimed any concealment (Tr. 184-185). Plaintiffs' witness Altman dispelled any claim of concealment, directly refuting an implication by Nichols and Glass that copies of the contracts were given only to white employees (Tr. 205, 206, 208). Plaintiffs admitted that they could not know what Company management higher than Miller would have done with a grievance processed to its attention (Tr. 78, 139, 187).

This does not make out even a prima facie case in support of the complaint.

The evidence of the defendant Union and Company then establishes this:

There was no concealment (Tr. 184, 238-262, 282-285). Copies of all contracts, notices of promotion procedures and of job openings were made available to white and colored employees alike (Tr. 205, 208, 210, 213, 245). Seniority alone would not entitle an employee to a promotion to carman-inspector, but qualifications including examination on A.A.R. rules was required until 1955 (Tr. 195, 248-250). These requirements were neither unreasonable nor discriminatory (Tr. 415). Chairman Wolff and Fontenet made these requirements known to all employees, and particularly Negro helpers, in the usual manner (Tr. 256-257). Fontenet never told Wolff or anyone with Railroad management of any complaint that Negroes were being discriminated against in the terminal (Tr. 284). No plaintiff ever bid on an inspector's job, though many openings were filled between 1943 and 1955 (Tr. 34). No grievances were ever presented to Wolff or to the Company (Tr. 175). It was not the Company's policy to discriminate on account of race during 1943-1955 (Tr. 285), and Negroes were promoted to carmen-inspector regularly during that period in shops (Tr. 35-36).[5] Had any grievance reached responsible Company management above Miller, any racial discrimination would have been eliminated (Tr. 285). None with management were aware of any attitude of Miller attributed to him by plaintiffs (Tr. 284, 222).

None of the plaintiffs studied the A.A.R. rules (Tr. 233-238), or attempted to report for the examination required for promotion (Tr. 274). These people simply made no

---

[5] Between March 1, 1943, and June 13, 1955, a total of 338 carmen helpers were promoted to journeymen by the Railroad, 163 of whom were Negroes (Tr. 357-371).

reasonable effort to get themselves promoted (Tr. 256-257, 262-263).

This record amply supports the findings of fact of the District Court, as affirmed by the Court of Appeals.

3. The Jury Selection Cases Cited in the Petition are Inapposite.

In the Petition for Certiorari, admitting that in cases involving "the employment relations * * * the employee must exercise some initiative and perhaps actually seek the job", plaintiffs invoke the cited jury selection cases by way of "clearest analogy" as determinative here. They say that the record in this case establishes that plaintiffs "were systematically excluded from participation in the upgrading practice", and urge that this is dispositive of the suit.[6]

The jury selection cases cited in this respect are totally inapposite here. The law of these cases is that intentional exclusion of Negroes, or any identifiable group, from juries by state or federal government is a denial of equal protection of the law, guaranteed to persons tried by juries so selected by the Fifth and Fourteenth Amendments. *Smith* v. *Texas*, 311 U.S. 128; *Boling* v. *Sharp*, 349 U.S. 497; *Cassell* v. *Texas*, 339 U.S. 282; and the other cases cited in the Petition. But purposeful discrimination may not be assumed or merely asserted. *Brownfield* v. *South Carolina*, 189 U.S. 426; *Smith* v. *Mississippi*, 162 U.S. 592. It must be proven, *Tarrance* v. *Florida*, 188 U.S. 519; *Martin* v. *Texas*, 200 U.S. 316, the quantum of proof being a matter of federal law. *Norris* v. *Alabama*, 294 U.S. 587;

---

[6] Petitioners imply that defendants have not shown that plaintiffs were not qualified "after presenting themselves for upgrading". (Petition p. 15). This is precisely what plaintiffs never did in accordance with the clear demands of the contract.

Smith v. *Texas*, 311 U.S. 128. Where there is no total exclusion of a racial group from either grand or petit juries, as in *Norris* v. *Alabama*, *supra*, *Hill* v. *Texas*, 316 U.S. 400, or token inclusion, as in *Thomas* v. *Texas*, 212 U.S. 278; *Avery* v. *Georgia*, 345 U.S. 559, a prima facie case of invidious discrimination under the Fourteenth Amendment is not made out by a showing that no Negroes served a petit jury for years. *Swain* v. *Alabama*, No. 64, October Term, 1964; 25 U.S. Supreme Court Bulletin No. 14, p. 997, March 8, 1965.

In *Swain* v. *Alabama*, *supra*, this Court holds that total exclusion of Negroes from juries over an extended period of time makes, at best, only a prima facie case of purposeful discrimination on account of race; "a fair inference of discrimination * * * which is determinative *absent sufficient rebuttal evidence*", (emphasis added). But, as in *Swain*, such a history of exclusion may be the result of other and perfectly legitimate factors, such as the operation of the peremptory challenge system, and those asserting discrimination in the operation of this system must prove it.

So, in the case at bar, the promotion of all employees is governed by the operation of a collective bargaining relationship and contract. It is asserted by plaintiffs that the defendants applied the contract in a discriminatory manner by denying plaintiffs promotional rights solely because of race. Defendants deny this and the record is replete with proof of other factors that bear on the matter, principal of which was failure of plaintiffs to establish their qualifications, or even to make application for promotion according to the uniformly applied requirements of the contract. Plaintiffs cannot prove their case now by pointing solely to proof that no Negro in the terminal was promoted to inspector between 1943 and 1955. Even the jury selection cases will not support such an argument.

The record in this case demonstrates a rather typical employment situation governed by the Railway Labor Act. A union has exclusive representation rights of a group of employees of a railroad employer, and these two enter into a non-discriminatory collective bargaining contract covering such employees. Promotion, demotion and layoff situations are subject to a usual contract procedure, in which job openings must be filled on the basis of seniority *and* qualification to perform the job. Time limits usually exist, and a non-bidding or non-qualifying employee is foreclosed from complaining if another and junior man is selected — and it is patent that no seniority system could operate otherwise. Chaos would result if employees were permitted to stand by inactive for years and then urge denial of a promotional right on any ground, including racial discrimination. Seniority rights which have vested in scores of other moves would be disrupted, and job security would be impaired.[7] The collective agreement contains a grievance procedure specifically designed for processing of a complaint by any employee that he has been deprived of a right under the contract. Time limits exist here too, else the collective bargaining device would result in complete disorder. Any employee claiming denial of a contract right must present a grievance, usually through his union representative, and this is then processed through various steps, through the higher echelons of both unions and management, to ultimate determination by the Adjustment Board.[8] Failure to timely file and process a grievance is determinative of it; and surely so as to the employer, even if a union representative were

[7] It is for this reason that the answers of both defendants in the trial court urge that all other employees in the same unit with plaintiffs are necessary parties to a suit like this (Tr. 310, 321).

[8] Failure to exhaust this remedy is also raised as a defense (Tr. 317, 321).

at fault in not presenting a grievance lodged with him by an employee.

In order to invoke even their own conception of the law of the jury selection cases, plaintiffs must show that they "presented themselves for upgrading" (Petition p. 13). The only way this could have been done under the contract was to qualify for promotion, but this plaintiffs refused to do for reasons of their own. This employer cannot now be charged with having denied promotion to a person who never presented himself for promotion.

The plaintiffs have not proved their case, and the District Court and Court of Appeals correctly so found.

CONCLUSION

The judgments below should be sustained, and the petition for writ of certiorari denied.

Respectfully submitted,

.....

Hugh M. Patterson

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of March, 1965, a true and correct copy of this Brief was served on Mr. Roberson L. King, 1013 Calico Building, Houston, Texas, by placing the same in the United States mails, properly addressed, postage prepaid, certified mail.

.....